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No. 71-218

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1971

FRED HAYES & KENNETH McMASTER,
Petitioners.

vs.

UNITED STATES OF AMERICA,
Respondent.

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IN THE

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FRED HAYES & KENNETH McMASTER,
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vs.

UNITED STATES OF AMERICA,
Respondent.

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PETITION FOR A WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS OF NEW ORALEANS, LOUISIANA

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The petitioners, Fred Hayes and Kenneth McMaster, respectfully pray that a writ of Certiorari issue to review the opinion and judgment of the Fifth Circuit Court of Appeals of New Orleans, Louisiana, entered in this proceeding on June 17, 1971, and the order overruling their motion for rehearing on July 14, 1971 (No. 71-1165, below).

2. HAYES & McMASTER vs. U.S.A.

## JURISDICTION

The Judgment of the Court of Appeals, Fifth Circuit Court of New Orleans, Louisiana, was entered on June 17, 1971, on the petitioners' appeal from the U. S. District Court of the Eastern District of Texas, Tyler Division, and the Court overruled the petitioners' motion for rehearing on July 14, 1971. The jurisdiction of this Court is invoked under Title 28 U.S.C. Sec 1254(1); and Title 18 U.S.C. 241, and 18 U.S.C. 1509, which gave jurisdiction to the Court of first instance; and on first impression.

## QUESTIONS PRESENTED

On Admission of Extraneous Matters:

1. Whether, a conviction can stand on alleged extraneous offenses to bear upon intent to do the thing for which a citizen is on trial, where that citizen has been subsequent to said trial charged, tried, and cleared of the most despicable one

of the lot.

2. Whether, a citizen can be convicted by the use of a flood of alleged extraneous offenses to prove intent for the commission of the offense that he is on trial for, where he has an absolute defense as a matter of law to said extraneous offenses.

3. Whether, alleged extraneous offenses which clearly show, by the government's own witnesses, to be nonaggressive and only a willingness and intent to defend only, could be used to prove intent to commit some aggressive act for which a citizen is on trial.

4. Who can say whether or not the alleged extraneous offense, the most despicable of the lot, which the defendants were completely cleared of any part in, was the very one relied upon by the jury for conviction?

5. Can a broken chain of a flood of all-

eged extraneous offenses be sustained for the purpose of proving a consistent pattern of conduct relevant to the issue of intent?

On Prosecutor's Remarks on Summation:

6. Whether, a prosecutor, on summation to the Jury, can place the prestiege and weight of the bench, the bar, the press present, the marshall present, the Federal Agents present, the spectators, and friends of the defendants present, squarely behind his remarks outside of the record, and unsworn to, which are prejudicial.

7. Whether, a prosecutor, on summation to the Jury, can indirectly call attention to the fact that the defendant did not testify during the trial, and more especially, as here, where the defendants demanded the right to testify and were absolutely refused with threat of imprisonment for contemp by trial counsel.

5. HAYES & McMASTER vs. U.S.A.

On Ineffective Counsel:

8. Whether, a conviction can stand on the testimony which could have been very easily refuted, and the prosecuting witnesses could have been very easily impeached, all by a simple cross-examination of the witnesses. Does not this amount to ineffective counsel?

9. Whether, a citizen can be said to have had effective counsel, in this enlightened age, where said counsel made no on the ground investigations, took no statements, refused the services of a detective, took no photographs, refused to use readily available character witnesses, refused to cross-examine "favorable" government witnesses, failed to obtain one single witness on their own investigation, made no briefing of the applicable law, did not correlate the facts

and the law, did not call available favorable witnesses as to the defendants' whereabouts and activities on the day in question, refused to permit the defendants the right to testify (with threat of contempt and year in jail), and refused to defend against the alleged extraneous offenses used to bear upon intent.

10. Can former trial counsel, on defendants' hearing on Motion for New Trial, voluntarily and deliberately, without duces tecum or other process, hand over to the prosecutor and the Court privileged communication in the effort to defeat the Motion for New Trial, with no hope or purpose to benefit themselves, but to defeat the former clients' effort for a New Trial?

7. HAYES & McMASTER vs. U.S.A.

## STATEMENT OF THE CASE

The petitioners asserts three points as grounds for a new trial: 1. The trial Court erred in admitting such a flood of evidence on alleged extraneous matters as to far outweigh the probative value on intent to do the act for which they were on trial; and 2. In not granting a new trial because of the prejudicial remarks of the prosecutor on final summation to the Jury; and 3. That they did not receive the benefit of effective counsel.

The petitioners were charged and tried with conspiracy under Title 18 U.S.C. 241, and 18 U.S.C. 1509, in connection with the bussing of children (of all races) in and about the Longview School District, and alleged to have violated the rights of Negro children; and in the Government's efforts to bear upon the intent of the petitioners they introduced a great number of alleged extraneous

offenses, some legal and some illegal, and all without charge, indictment, or conviction; and among said alleged offenses only two were of an aggressive nature, and only one bearing upon a possible injury to people. The most despicable of the lot involved the alleged placing of "booby trap bombs" in the City of Nacogdoches, Texas, by two alleged co-conspirators who have never been charged or tried in any court. The petitioners were later charged, tried, and completely cleared of any connection with the placement of the "booby traps". The two alleged co-conspirators both testified in Federal Court that they went to the City of Nacogdoches, Texas, with the "booby trap bombs" with petitioners; however, a 19 year old Negro lad (Kenneth Ray Eddings) testified in their Texas District Court trial that neither of the petitioners were present, on cross-examination, and that he saw only

two men placing the "bombs" on the street. The same lad, Kenneth Ray Eddings, testified at petitioners' Federal Court trial, but was not cross-examined by their trial counsel, and had they done so they would have found that neither of the petitioners were in the City of Nacogdoches at the time, thereby casting great doubt on the other alleged offenses. There has been no additional charges against petitioners in any Texas court, and no conviction in any court on any of the alleged extraneous offenses.

The authenticated copy of the Texas District Court (felony jurisdiction), 145th Judicial District, docket sheet was placed in the record with the Circuit Court with their Motion for Rehearing, along with the certified copy of the testimony of the 19 year old Negro lad.

The record below, if brough forward, will reflect all the above and more, and will further reflect the complete lack of effort

on the part of trial counsel to prepare for trial upon the merits in the Federal Court, all set out in Questions 9 & 10 herein (P. 5 & 6), if measured in the light of the Government's preparation, and common sense in legal circles of defense attorneys, and amounting to deliberateness or gross neglect, and when coupled with the Government's introduction of tainted and untrue evidence rendered it impossible for the petitioners to receive anything resembling a fair trial..

The Nacogdoches bomb incident was heavily relied upon by the Government throughout the trial, and on the Government's final summation to the Jury, and prominently displayed before the Jury, and even in the Government's brief to the Circuit Court, and even in the very opinion of the Circuit Court (App. P 2 & 3)

McMaster was only mentioned once, on false testimony of "immunity" witnesses, as being

connected with any alleged extraneous offense, and that was the Nacogdoches "booby trap" incident, which, because of his having been completely exonerated, leaves the record clear of any intent on his part; further, he too, demanded the right to clear himself of being connected with any other matter.

The record further reflects on their Motion for a New Trial that the petitioners vigrously demanded the right to testify (admitted by trial counsel), and they were refused with threat if they attempted to do so over their attorney's wishes (year in jail for contempt).

## ADDITIONAL REASONS RELIED UPON FOR GRANTING OF CERTIORARI

That if the decision stands a citizen would be convicted, as far as we or anyone can tell, on evidence which simply is not true, but taken to be true by the Jury.

12. HAYES & McMASTER vs. U.S.A.

That conspiracy trials are not generally favored, and the evidence on intent on such trials must be great, clear, consistent and direct, and factual and true; the Government has an extraordinarily high burden of proof with respect to intent, and it is a very important and essential element of the crime; indeed, without intent there would be no Federal case at all; further, we have imputed or presumed guilt instead of the presumption of innocence, and the right to the presumption of innocence clearly violated.

That the Circuit Court's decision is in conflict with Jackson vs. U. S., 371 Fed$^2$ 960, D.C. Circuit Court.

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the Judgment and opinion of the Fifth Circuit Court of Appeals of New Orleans, Louisiana.

Respectfully Submitted,

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Fred Hayes,
Petitioner.

Kenneth McMaster,
Petitioner.

IN THE

# United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-1165

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

FRED LOYD HAYES AND KENNETH RAY McMASTER,
Defendants-Appellants.

*Appeal from the United States District Court for the Eastern District of Texas*

(June 17, 1971)

Before AINSWORTH, INGRAHAM and RONEY, Circuit Judges.

AINSWORTH, Circuit Judge: Appellants, Hayes and McMaster, have appealed their conviction on a two-count indictment in connection with dynamiting of 33 Longview School District buses on July 4, 1970. They are charged first with violation of 18 U.S.C. § 241 relative to conspiracy to injure a citizen in the free exercise of any right secured under the Constitution or laws of the United States, to-wit, the right to attend school without regard to race or color, pursuant to which de-

fendants dynamited the School District's buses to prevent transportation of Negro students to school; and secondly, with violation of 18 U.S.C. § 1509 relative to a wilful attempt by threats or force to interfere with the exercise of rights under any decree of a court of the United States in that they interfered with the School District by dynamiting its buses and preventing the transporting of Negro students to school.

Appellants were part of a group of white residents of Longview, Texas, who allegedly feared a "revolution" of black members of the community, and were concerned with events in connection with public school integration. The group met frequently to discuss and prepare for their defense against the purported forthcoming Negro uprising. Lethal weapons, such as cannon, mortar, hand grenades, Molotov Cocktails, gun powder, and dynamite, were secured by the group for future use. The ammunition was secreted in large quantities in appellant Hayes' garage and at an outlying farm area. Several experiments were conducted by members of the group in the use of the explosives.

At the trial evidence was adduced through fellow-members of the Longview group and other Longview residents about appellants' participation in the conspiracy to prepare for the counterattack. It was shown that defendant Hayes, on June 25, 1970, dynamited a house purchased by a Negro woman in a white neighborhood. There was also testimony that defendant Hayes and one of the coconspirators constructed "booby traps" by placing dynamite in flashlight cases, wiring an electric cap to a battery which was then connected to the flashlight switch. The device was designed

to explode when the switch was turned on. Hayes, McMaster and two coconspirators then took the devices and drove to a Negro residential neighborhood in Nacogdoches, Texas, where Hayes and one of the other men placed two of the "booby traps." The evidence also showed that following the issuance of a federal court order by Judge Fisher on June 17, 1970, approving the busing of Negro students to all-white schools, appellants and other members of the group formulated a plan to impede the transportation of the students to the Longview schools by dynamiting the buses. The plan was carried out and on July 4, 1970, under cover of darkness, charges of dynamite were set beneath the buses and exploded, causing serious damage to the vehicles and the parking area.

Appellants contend that evidence relative to extraneous events prior to the bus bombings, which we have heretofore discussed, was inadmissible.

Evidence of bombing of the dwelling and the placing of "booby trap" flashlights was properly admitted for the purpose of proving a consistent pattern of conduct relevant to the issue of intent. *United States v. Pittman*, 5 Cir., 1971, ___ F. 2d ___ [No. 29868, February 22, 1971]; *United States v. Justice*, 5 Cir., 1970, 431 F. 2d 30, 32-33; *United States v. Smith*, 5 Cir., 1970, 433 F. 2d 1266, 1270; *Gilstrap v. United States*, 5 Cir., 1968, 389 F. 2d 6, 9. The incidents referred to were closely related in time and character to the school bus dynamiting incident. See *United States v. Justice*, supra; *Miller v. United States*, 5 Cir., 1968, 397 F. 2d 272, 273; *Lindsey v. United States*, 5 Cir., 1955, 227 F. 2d 113, 117.

Appellants also urge that error was committed by alleged prejudicial remarks of the prosecutor in his final argument to the jury. He remarked that a child had asked him, "Why did those men bomb those buses?" Later in his argument the prosecutor said, "There is no doubt in anybody's mind in this court room that they are guilty." An objection was made and sustained to the latter remark. In his charge, the District Judge instructed the jury that statements and arguments of counsel are not evidence, and that they were to consider only evidence in the case. In regard to the prosecutor's reference to a child's question, there was no testimony by any child at the trial. However, no timely objection to the remark was made by defense counsel. Since we find no plain error in the prosecutor's comments, any alleged impropriety was waived by counsel's failure to object. See *United States v. Fuentes*, 5 Cir., 1970, 432 F. 2d 405, 409; *Rotolo v. United States*, 5 Cir. 1968, 404 F. 2d 316, 317. Because of the overwhelming evidence of guilt, it can hardly be said that appellants were prejudiced in the minds of the jury by the prosecutor's comments. Even taking the view most favorable to appellants, such remarks do not constitute the type of obvious and substantial error which would be grounds for reversal. *Sykes v. United States*, 5 Cir., 1966, 373 F. 2d 607, 612; *United States v. Fuentes*, supra.

Finally, appellants complain of ineffective and incompetent trial counsel. Their principal defense attorney, Mr. Tunnell, was admitted to the Texas Bar in 1948, elected County Attorney in 1950, in which capacity he served for eight years, appointed Assistant United States Attorney in 1958, and then United States Attorney in 1961. Co-counsel, Mr. Gibson, was admitted

to the Texas Bar in 1927. He testified that he served part of four terms as a county judge. The record negates the contention of incompetent or ineffective counsel. On the contrary, it shows that defendants were vigorously represented.

A decision was made that defendants were not to testify at the trial. They now contend that the decision was made by their defense counsel contrary to their wishes. They contend, through new counsel on appeal, that original defense counsel failed to prepare adequately for trial, briefed no law, did not ascertain "readily available" impeaching evidence of government witnesses, and failed to call available character witnesses for defendants. Both attorneys were retained counsel, thoroughly experienced and competent in the law. That their trial strategy was unsuccessful is no reason for appellants to prevail here in their request for a new trial. The rule is that effective counsel "does not mean errorless counsel or counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." *Williams v. United States*, 5 Cir., 1971, ____ F.2d ____ [No. 31144, May 11, 1971]; *MacKenna v. Ellis*, 5 Cir. 1960, 280 F. 2d 592, 599. Applying this criteria to the facts in this case, we cannot conclude that appellants were deprived of effective representation of counsel.

We have reviewed each and every error complained of on this appeal and find them to be without merit. Accordingly, the judgment and conviction is as to each defendant

AFFIRMED.

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No. 71-213

# In the Supreme Court of the United States

OCTOBER TERM, 1971

FRED HAYES AND KENNETH McMASTER, PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-5) is not yet reported. The district court did not render an opinion.

### JURISDICTION

The judgment of the court of appeals was entered on June 17, 1971; rehearing was denied on July 14, 1971. The petition for a writ of certiorari was filed on August 11, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTIONS PRESENTED

1. Whether the trial judge erred in admitting evidence of petitioners' prior criminal acts to prove peti-

tioners' specific intent to commit the offenses charged in the indictment.

2. Whether petitioners are entitled to a new trial by reason of allegedly improper statements made by the United States Attorney in his summation to the jury.

3. Whether a new trial should be ordered because of alleged errors committed by petitioners' retained trial counsel in conducting petitioners' defense.

## STATUTES INVOLVED

18 U.S.C. 241 provides, in pertinent part:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; * * *
>
> They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; * * *.

18 U.S.C. 1509 provides, in pertinent part:

> Whoever, by threats or force, willfully prevents, obstructs, impedes, or interferes with, or willfully attempts to prevent, obstruct, impede, or interfere with, the due exercise of rights or the performance of duties under any order, judgment, or decree of a court of the United States, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

## STATEMENT

Petitioners were convicted of violating 18 U.S.C. 241 and 18 U.S.C. 1509 by dynamiting 33 school buses

owned by the Longview, Texas, School District in an effort to prevent the school system from complying with a federal court order to desegregate its schools. Petitioners were sentenced to maximum terms of imprisonment pending the results of a study pursuant to 18 U.S.C. 4208. The court of appeals affirmed on June 17, 1971 (Pet. App. A).

The court of appeals accurately described petitioners as "part of a group of white residents of Longview, Texas, who allegedly feared a 'revolution' of black members of the community, and * * * met frequently to discuss and prepare for their defense against the purported forthcoming Negro uprising" (Pet. App. A2). To that end, the group acquired various lethal weapons, and the dynamite later used to damage the Longview school buses (App. 465–472; 1163).[1] On several occasions prior to the bus bombing, the petitioners took action designed to intimidate Negroes who sought to exercise their civil rights. An indicted co-conspirator, Robert Sparks, Jr., testified that in 1970 he and the petitioners planted "booby trapped" flashlights charged with dynamite in the streets of Nacogdoches, Texas, in an effort to discourage Negro civil rights demonstrations then occurring in that city (App. 760–765). Another co-conspirator, Glen Parker, testified that on June 25, 1970, he was the driver when petitioner Hayes dynamited a house recently purchased by a Negro woman in a formerly all-white neighborhood (App. 1144–1147).

[1] "App." refers to the "Appendix to the Briefs" which was filed in the court of appeals and a copy of which was lodged with this Court by petitioners.

Parker told of being present while petitioners planned to dynamite the Longview school buses, on July 4, 1970, in order to prevent the implementation of a desegregation order (App. 1157–1159). Sparks testified to observing the parking lot with petitioner Hayes in order to plan the bombing (App. 800–806). Both related admissions of Hayes after the bombing (App. 808–809; 1168).

**ARGUMENT**

1. Petitioners contend that the trial court erred in admitting evidence of other violent acts committed by petitioners (*i.e.*, the planting of "booby traps" and the house bombing) to intimidate Negroes in the exercise of their rights. However, when, as here, the defendants' specific intent is an essential element of the offense charged,[2] evidence of prior criminal activity is admissible if it is relevant to proof of defendants' intent in committing the offense at issue. *United States* v. *Justice,* 431 F. 2d 30 (C.A. 5); *United States* v. *Marine,* 413 F. 2d 214 (C.A. 7), certiorari denied, 396 U.S. 1001; *Von Feldt* v. *United States,* 407 F. 2d 95 (C.A. 8).

Proof of petitioners' prior acts of intimidation—both of which were racially motivated and occurred shortly before the dynamiting of the buses—was relevant to the issue of petitioners' intent since it tended

[2] In order to prove an offense under 18 U.S.C. 241, the government must prove that the defendants acted with the specific intent to injure a citizen in the free exercise of any right secured by the Constitution or laws of the United States. See, *e.g.*, *United States* v. *Guest*, 383 U.S. 745; *United States* v. *Cruikshank*, 92 U.S. 542.

to prove that petitioners were engaging in a course of conduct designed to intimidate Negroes in the exercise of their rights (see Pet. App. A3).[3]

2. Petitioners further contend that certain statements made by the United States Attorney during his summation to the jury were improper and were sufficiently prejudicial to vitiate their convictions (see Pet. App. A4). The prosecutor remarked that a child had asked him, "Why did those men bomb those buses?" (App. 1491). Later the prosecutor said, "There is no doubt in anybody's mind in this courtroom that they are guilty" (App. 1493). No objection was made to the first statement. The court below observed that there was no plain error in the remark and any impropriety was waived by counsel's failure to object. See also *Singer* v. *United States,* 380 U.S. 24, 30; *United States* v. *Fuentes,* 432 F. 2d 405, 409 (C.A. 5); *United States* v. *Dibrizzi,* 393 F. 2d 642, 645 (C.A. 2); *Heald* v. *United States,* 175 F. 2d 878 (C.A. 10). The objection taken to the remark about guilt was sustained by the trial court. Moreover, in his charge the trial judge admonished the jury that statements and arguments of counsel are not evidence

[3] Petitioners also object to the admission of evidence relating to the Nacogdoches incident on the ground that they were prosecuted by the state for that offense and acquitted. However, petitioners' trial for that offense occurred subsequently to their conviction here. Moreover, they were not acquitted of the charge. The case (cause No. 8995–70–12, 145th Judicial District Court of Nacogdoches County, Texas) was dismissed on February 22, 1971, upon the request of the state prosecutor, when a principal witness for the prosecution declined to testify to procedures used by him in disarming a bomb on the ground that he would be obliged to disclose classified military information.

(App. 1510; Pet. App. A4). Finally, as the court below observed, "Because of the overwhelming evidence of guilt, it can hardly be said that appellants were prejudiced in the minds of the jury by the prosecutor's comments" (Pet. App. A4).

3. Petitioners claim, as they did below, that they were inadequately represented at trial (Pet. 5–6). Both courts below found the contentions to be without merit (see App. 1551–1592; Pet. App. A4–5), Indeed, the court of appeals viewed the criticism, particularly of the decision not to have the defendants testify, as retrospective criticism of defense counsel's trial strategy, and properly held that the fact that the "trial strategy was unsuccessful is no reason for * * * a new trial" (Pet. App. A5). Cf. *Lutwak* v. *United States*, 344 U.S. 604, 619.[4] Accordingly, petitioners' assertion of inadequate counsel provides no basis for further review by this Court.

## CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
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DAVID L. NORMAN,
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ROBERT S. GREENSPAN,
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SEPTEMBER 1971.

[4] Petitioners were represented by able and experienced trial counsel. The principal defense counsel, Mr. Tunnell, was formerly a United States Attorney. Co-counsel, Mr. Gibson, in addition to his lengthy experience as an attorney, served as a county judge (Pet. App. A4–5).

U.S. GOVERNMENT PRINTING OFFICE: 1971